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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division -- Felony Branch

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 2011-CF1-18396**
	:	
v.	:	**Judge Ronna Beck**
	:	
	:	**Continued Motions Hearing: January 28, 2013**
KARL PUGH	:	

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

I. MR. PUGH'S STATEMENTS MUST BE SUPPRESSED BECAUSE HE WAS NOT GIVEN A VALID *MIRANDA* WARNING PRIOR TO PURPORTING TO WAIVE HIS RIGHTS

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that an "accused must be adequately and effectively apprised of his rights" before being subjected to custodial interrogation. *Id.* at 467. This requirement, which is an "absolute prerequisite" to interrogation, *id.* at 468, 471, is separate and distinct from the knowing, intelligent, and voluntary waiver requirement. Thus, before admitting an accused's statement at trial, the government must establish *both* that the accused received an effective warning, *id.* at 467, *and* that he knowingly, intelligently, and voluntarily waived his rights, *id.* at 478, 479. If the police fail to provide an adequate warning, any ensuing statement must be suppressed without "paus[ing] to inquire in individual cases whether the defendant was aware of his rights." *Id.* at 468.

The detectives did not reasonably convey to Mr. Pugh his rights as required by *Miranda* prior to Mr. Pugh's purported waiver. The Supreme Court has noted,

> "[j]ust as 'no talismanic incantation [is] required to satisfy [*Miranda's*] strictures,' it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. 'The inquiry is simply whether the

> warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*.' ***The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires***. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment."

Missouri v. Seibert, 542 U.S. 600, 611-612 (2004). (Internal citations omitted) (Emphasis added). The detectives in this case interrogated Mr. Pugh and received damaging answers from Mr. Pugh without re-reading[1] him the warnings required by *Miranda*. By the time the detectives purported to re-advise Mr. Pugh of his *Miranda* warnings, the threshold issue is whether it would be reasonable to find that in these circumstances the warnings could function effectively as *Miranda* requires. The answer is, no.

Between Mr. Pugh invoking his right to counsel and the detectives purporting to re-advise Mr. Pugh of his Miranda warnings, the detectives made several statements to Mr. Pugh that conflicted with the objectives of *Miranda*, rendering ineffective the purported re-advising Mr. Pugh of his *Miranda* rights. Specifically, Detective Delauder told Mr. Pugh, "...I need you to come one hundred percent clean or I can't help you, all right?" (*See* Transcript[2] of Mr.

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[1] Officers that interrogate a suspect after the suspect invokes his right to counsel are required to re-advise the defendant of his *Miranda* rights and obtain a valid waiver of those rights before resuming the interrogation. *See Dorsey v. United States*, No. 06-CF-1099, 2013 D.C. App. LEXIS 3, at *70 (D.C. Jan. 3, 2013) ("Even if we were to posit that [the defendant's] request to speak with the detectives on Sunday constituted a valid initiation under *Edwards*, the admissibility of his responses to subsequent interrogation depended on whether the detectives then obtained a valid waiver from [the defendant] of his Fifth Amendment rights to remain silent and to have counsel. Although [the defendant] previously had asserted those rights, [the detectives] ***did not re-advise him*** or obtain an explicit waiver from him before they resumed his interrogation.") (Emphasis added).

[2] Throughout this Motion, undersigned counsel will refer to the transcript he provided to the Court and the parties on

Pugh's Statement at pp. 30, lines 15-16). The detectives went on to tell Mr. Pugh, "...you're not going to work with me here, I can't help you. It looks better when I go to a judge in the morning and I say hey look, the man made a mistake and this is what happened versus, you know, versus you sitting in here telling me you don't want – you don't know what happened, when I can sit there and look on the video camera, okay? So it's up to you. It's your life." (*See* Transcript of Mr. Pugh's Statement at pp. 31, lines 11-16). Detective Delauder further told Mr. Pugh, "...now's the time to... confess – what did you do, Karl?" (*See* Transcript of Mr. Pugh's Statement at pp. 31-32, lines 21-4).

The foregoing statements by the detectives conflicted with the objectives of *Miranda*. Indeed, *Miranda* was set forth by the Supreme Court's recognition that "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda v. Arizona*, 384 U.S. at 455. In order to dispel the coercion inherent to custodial interrogation, *Miranda* requires the police to: 1) inform the accused that he has the right to remain silent "in clear and unequivocal terms," *id.* at 467-68; 2) assure that the "individual's right to choose between silence and speech remains unfettered throughout the interrogation process," *id.* at 469; 3) make the accused aware of the negative consequences of speaking, specifically, that "anything said can and *will* be used *against* the individual in court," *id.* (emphasis added); and 4) alert the accused "that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest," *id.* These warnings cannot be communicated effectively when a detective makes simultaneous statements that contradict or blur the substance of the warnings and the consequences of waiver. Here, Detective DeLauder's statements about

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January 13, 2013. Undersigned believes this to be a true and accurate transcript. Moreover, undersigned refers to the transcript as opposed to the timestamps on the videotaped copy of Mr. Pugh's interview simply because it is more convenient to refer to the transcript. To the extent there is an alleged discrepancy as to the accuracy of the transcript, undersigned respectfully requests the parties resolve it in open court by referring directly to the videotaped copy of Mr. Pugh's interview.

"helping" Mr. Pugh and "going to a judge in the morning" blurred the objectives of *Miranda* by explicitly indicating his role is to "help" Mr. Pugh by going to court and talking to a judge. Further, the detective's statements indicate Mr. Pugh's statements will be used to "help" Mr. Pugh in court. Those statements contradict the stated goals of *Miranda*, which are to alert the accused his statements can and will be used *against* him in court, and that he is not in the presence of persons acting solely in his interest.

A further indication the officers did not reasonably convey to Mr. Pugh his *Miranda* rights is the fact that the detectives explicitly told Mr. Pugh how to continue the ongoing interrogation instead of reading Mr. Pugh is rights and letting him decide for himself. Detective Delauder told Mr. Pugh, "[i]f you put yes in each one of these boxes [on the right's card], we can talk. If you put no in any of these boxes we can't talk." (*See* Transcript of Mr. Pugh's Statement at pp. 42, lines 17-19). The foregoing statements explicitly tell Mr. Pugh how to continue the interrogation. That fact, combined with the foregoing statements about the detectives helping Mr. Pugh by talking to a judge in the morning, give the impression that Mr. Pugh needs to "put yes" in each box in order to receive help from the detectives. The combination of the detective's statements preceding the purported warning deprived Mr. Pugh of a fair opportunity to make an informed choice as required by *Miranda*. Accordingly, prior to Mr. Pugh's purported waiver, the detectives did not reasonably convey to Mr. Pugh his *Miranda*.

Moreover, as in *Seibert*, it is "unrealistic" in this case to treat Mr. Pugh's un-Mirandized[3]

[3] The government may argue the detectives Mirandized Mr. Pugh by saying, "[w]ell, well let's -- are you telling -- are you telling me you want to talk to me without a lawyer present? Is that what you're telling me? Are you telling me that you're reengaging with me and you want to talk to me without a lawyer present?" (See transcript, pp. 29, lines 12-15). Any such argument must be flatly rejected as valid *Miranda* warning because it does not (1) inform Mr. Pugh that he has the right to remain silent "in clear and unequivocal terms, (2) assure that Mr. Pugh's right to choose between silence and speech remains unfettered throughout the interrogation process by telling him he could terminate the interview at any time, (3) make Mr. Pugh aware of the negative consequences of speaking, specifically, that "anything said can and will be used against the individual in court, or (4) alert Mr. Pugh that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest –all

interrogation as separate and distinct from the purportedly Mirandized-interrogation "subject to independent evaluation simply because [purported] *Miranda* warnings formally punctuate them in the middle." *Missouri v. Seibert*, 542 U.S. at 614. Here, the same detectives are present. *See Id.* at 615. The content of the interrogation is exactly the same. *See Id.* Undeniably, by the time the officers purport to re-advise Mr. Pugh of his *Miranda* rights, Mr. Pugh had already admitted (1) he got high with a friend (*See* Transcript of Mr. Pugh's Statement at pp. 32, lines 13-17); (2) that he went to the third floor of 800 Southern Ave (which is the scene of the shooting) (*See* Transcript of Mr. Pugh's Statement at pp. 33, lines 4-13); (3) that he got into an altercation with the decedent in that location (*See* Transcript of Mr. Pugh's Statement at pp. 33-34, lines 18-7); (4) that he ran out of the building with a rusty revolver in his hand (*See* Transcript of Mr. Pugh's Statement at pp. 37, lines 2-13) (the government's theory is that Mr. Pugh used a rusty revolver to murder the decedent) The detectives treated the second round as continuous with the first, *see id.*, by telling Mr. Pugh, "[a]ll right, listen to me; we got to handle some business here, all right, so we can continue this, all right?" (*See* Transcript of Mr. Pugh's Statement at pp. 42, lines 9-11). Lastly, the interrogation occurs in the same room. *See Id.* at 616. Accordingly, just like in *Seibert*,

> [it] would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk

Id., at 616-617. Because of the all of the foregoing factors, it would have been unnatural for Mr. Pugh to refuse to repeat, after the purported *Miranda* warnings, what he had said before. As in

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of which are required in order to constitute a valid *Miranda* warning. *See Miranda*, at 467-69.

Seibert, a reasonable person under the Mr. Pugh's position would not have understood that he retained a choice about continuing to talk. Thus, as in *Seibert*, the statements should be suppressed.

The government will likely try to distinguish *Seibert* on the basis that the officers in *Seibert* strategically used the "question-first tactic" whereas here, the detectives would have testified they made an honest mistake in not immediately re-advising Mr. Pugh of his rights. This argument is of no moment "[b]ecause the intent of the officer will rarely be as candidly admitted as it were [in *Seibert*] (even as it is likely to determine the conduct of the interrogation), [therefore] ***the focus is on facts apart from intent that show the question-first tactics at work***." *Id.* at 617 n.6. (emphasis added). In line with *Seibert*, the intent of the detectives is not the focal point in this case. The facts set forth above, apart from the detective's intent, show the question-first tactics at work. Although there is no testimony on this record as to the detective's intent, there remains no need to question to the detectives about their intent. The focus is on the facts. Regardless of the detectives' intent, the facts of this case show the detectives questioned Mr. Pugh first and then purport to re-read *Miranda* warnings. In other words, the *facts* in this case show the question-first tactics that were intentionally used in the *Seibert* case. Consequently, the result here should be the same result as in *Seibert*: "the facts here do not reasonably support a conclusion that the warnings given could have served their purpose." *Id.* at 617. Accordingly, Mr. Pugh's statements should be suppressed.

II. MR. PUGH'S STATEMENT MUST BE SUPPRESSED BECAUSE THE GOVERNMENT HAS NOT MET ITS BURDEN OF DEMONSTRATING A KNOWING AND INTELLIGENT WAIVER

The government cannot meet its burden because the detectives impaired Mr. Pugh's ability to appreciate his rights and make a knowing and intelligent waiver. In *Dorsey v. United*

States, detectives "compounded the seriousness of their *Miranda* violations by disparaging and devaluing [the defendant's] rights — exhorting him that their assertion would work to his disadvantage while their relinquishment would benefit him. The detectives' threats and assurances were designed to impair Dorsey's ability to appreciate his rights and make a rational decision whether to assert them." *Dorsey v. United States*, 2013 D.C. App. LEXIS at *79. The same is true in this case. Detective DeLauder disparaged and devalued Mr. Pugh's *Miranda* rights by telling him, ***"[n]ow the only thing you can do now is help yourself, and I'm here to help you. But if you don't want to help yourself, then shame on you***, all right. You got an opportunity to talk, so, okay? So, just so you know." (*See* Transcript of Mr. Pugh's Statement at pp. 13, lines 1-4). Telling Mr. Pugh, "shame on you" if Mr. Pugh chose to exercise his right not to speak with the detectives unequivocally devalued Mr. Pugh's *Miranda* rights. Just like the rationale of *Dorsey*, Detective DeLuader's statement was designed to impair Mr. Pugh's ability to appreciate his rights and make a rational decision whether to assert them. Detective Fultz compounded the problem by telling Mr. Pugh, "[o]nly thing is, we will read you [your *Miranda* rights], watch yourself and just think about it and give yourself an opportunity, okay? Don't ever shut the door and don't ever burn bridges." (*See* Transcript of Mr. Pugh's Statement at pp. 19, lines 8-11). Detective Fultz's statement about Mr. Pugh giving himself "*an opportunity*" is the same language Detective DeLauder used when telling Mr. Pugh, "...shame on you, all right. You got *an opportunity* to talk..." (*See* Transcript of Mr. Pugh's Statement at pp. 13, lines 1-4). These statements were designed to tell Mr. Pugh that he should take this "opportunity" to talk to the police or "shame" on him. Detective Fultz's assertion that Mr. Pugh should not "shut the door" or "burn bridges" was an indication that Mr. Pugh should take the "opportunity" to speak to the detectives – i.e., waive his *Miranda* rights - instead of exercising his *Miranda* rights and

"shut[ting] the door" on that "opportunity" to talk. These statements exhorted Mr. Pugh that asserting his *Miranda* rights would work to his disadvantage while their relinquishment would benefit him.

To further compound the foregoing problems, Detective DeLauder told Mr. Pugh "[if] you're not going to work with me here, I can't help you. It looks better when I go to a judge in the morning and I say hey look, the man made a mistake and this is what happened versus, you know, versus you sitting in here telling me you don't want – you don't know what happened, when I can sit there and look on the video camera, okay?" (*See* Transcript of Mr. Pugh's Statement at pp. 31, lines 11-16). This statement is problematic for several reasons as it relates to the government's burden to demonstrate a knowing and intelligent waiver. First, Detective DeLauder's statement conveys a message that contradicts an objective of *Miranda*, which is to alert the accused "that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest." *Miranda* at 469. Detective DeLauder's statement conveys a message that he will help Mr. Pugh by going to a judge the following morning, which is contrary to a stated objective of Miranda – to alert the accused he is not in the presence of persons acting solely in his interest. By setting forth a message that blurred the objectives of *Miranda*, Detective DeLauder impaired Mr. Pugh's ability to make a rational decision whether to assert his *Miranda* rights. Second, "working with the detectives" necessarily meant Mr. Pugh would need to waive his *Miranda* rights and agree to speak to the detectives. Indicating that Mr. Pugh needed to "work with" the detectives – i.e., waive his *Miranda* rights and speak to the detectives - in order to receive "help" by the detective talking to a judge impaired Mr. Pugh's ability to intelligently make a rational decision whether to assert his *Miranda* rights. Accordingly, the totality of the circumstances indicates the government cannot

meet its burden of establishing a knowing and intelligent waiver.

III. MR. PUGH'S STATEMENTS SHOULD BE SUPPRESSED BECAUSE THE GOVERNMENT CANNOT MEET ITS BURDEN OF DEMONSTRATING A VOLUNTARY WAIVER

The Court of Appeals has adopted strong language in setting forth the proposition that "[t]here are *no* circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor." *Dorsey* at *82, *citing*, *United States v. Harrison*, 34 F.3d 886, 891-92 (9th Cir. 1994) (Emphasis in original). Indeed, an *explicit* statement about harsher treatment by a judge is not necessary to trigger the foregoing principal set forth in *Dorsey*. The *Dorsey* Court prohibits the mere *suggestion* that a suspect's exercise of the right to remain silent may result in harsher treatment by a court. *Id.* (Emphasis added).

The totality of the circumstances in this case shows the detectives, at a minimum, *suggested* Mr. Pugh would receive harsher treatment by a judge if he did not waive his *Miranda* rights. First, the detectives indicated to Mr. Pugh "shame on [Mr. Pugh]" if Mr. Pugh did not waive his *Miranda* rights and talk to the detectives. *See Supra* at 6-7. Additionally, the detectives told to "give himself an opportunity." *See Supra* at 7. Mr. Pugh, "[if] you're not going to work with me here, I can't help you. It looks better when I go to a judge in the morning and I say hey look, the man made a mistake and this is what happened..." S*ee Supra* at 7-8. The officers continued suggesting to Mr. Pugh that a Court may treat him harsher if he did not answer questions about a gun by telling Mr. Pugh, "[o]kay so when I go to the judge in the morning, it's always better to say your honor, he fully cooperated other than your honor, he don't know nothing about a gun." (*See* Transcript of Mr. Pugh's Statement at pp. 61, lines 7-9). Even still, after Mr. Pugh tried to tell the officers he did not know or remember certain details, Detective

DeLauder continued suggesting to Mr. Pugh that a Court may treat him harsher by saying, "Karl what am I gonna tell these people? What am I going tell them in the morning about what's going on? What am I gonna tell them? What am -- what am I gonna tell them in the morning to help you out?" (*See* Transcript of Mr. Pugh's Statement at pp. 106, lines 3-6). The explicit proposition is that the detectives cannot help Mr. Pugh if Mr. Pugh does not "work with [them]". As previously stated, "working with the detectives" necessarily meant Mr. Pugh would need to waive his *Miranda* rights and agree to speak to the detectives. Thus, the detectives told Mr. Pugh they could not "help" Mr. Pugh unless he "worked with" them. In other words, the detectives told Mr. Pugh they could not help him if he did not waive his *Miranda* rights and speak to them. The combination of the detectives' statements about Mr. Pugh needing to "work with" them in order to receive "help" and the detectives' statements about talking to a judge the following morning suggests the "help" would be in the form of speaking to a judge the following morning. The implicit suggestion is that if Mr. Pugh did not "work with" the detectives, they would give the judge an unfavorable report the following morning. This suggestion is evidenced by the detectives statements such as, "when I go to the judge in the morning, it's always better to say your honor, he fully cooperated" and "what am I gonna tell them in the morning to help you out." See Supra at 9. The detective's assertion it would be "better" to tell a judge Mr. Pugh fully cooperated suggests it is worse to tell a judge Mr. Pugh did not fully cooperate. This is the type of suggestion *Dorsey* strongly condemns.

The *Dorsey* Court noted, "[h]ad Dorsey given in and confessed during the first round of interrogation, we would find it impossible to conclude that he made a voluntary waiver or confession." *Dorsey*, at *82. The Court relied, in part, on the fact that Dorsey "had been given a break lasting several hours, during which he rested and could reflect on his situation...[and] he did

not feel intimidated [during the break]." *Id.* at 84. Mr. Pugh was not given a several hour break nor was he moved to a cell (as was the case in *Dorsey*). Mr. Pugh was given a break that lasted less than an hour and he remained chained to the same chair in the same interrogation room. The fact that Mr. Pugh's "break" lasted less than an hour while he remained chained to the same chair coupled with Mr. Pugh's long soliloquies throughout the "break" make clear that he did not have the opportunity to rest and reflect as was the case in *Dorsey*. Even still the Court attached "minimal significance" to the fact that Dorsey was given a several hour break. *Id.* More central to the Court's decision was the fact that the trial court found that Dorsey's confession was motivated by feelings of remorse, and the Court of Appeals would not disturb the trial court's factual findings unless they were clearly erroneous. *See id.* at 86-87. In this case, Mr. Pugh's statement was not motivated by feelings of remorse. Instead, it was motivated by the detectives making several statements that contradict with the goals of *Miranda* such as, "...shame on you..." and "it's your life" and that he needed to "work with" them so they could give a favorable report to a judge the following morning. Thus, the government cannot meet its burden of demonstrating Mr. Pugh's statement was voluntary. Accordingly, it should be suppressed for all purposes.

WHEREFORE, for the reasons set forth above and for any other reason[4] that may appear to the Court at a hearing on this Motion, Mr. Pugh requests that this Motion be granted.

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[4] In this Supplemental Memorandum, undersigned attempted to address the concerns set forth this Court at the end of the hearing on January 14, 2003. However, Mr. Pugh does not waive any argument set forth in the original Motion to Suppress Statements filed by undersigned counsel. Specifically, Mr. Pugh maintains he did not re-initiate any conversation with the detectives under *Edwards v. Arizona*, 451 U.S. 477 (1981) or *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). Mr. Pugh merely asked to use the phone. (See Transcript pp. 26, lines 17-18). Detective DeLauder answered Mr. Pugh question, inserting a phrase designed to make Mr. Pugh second-guess his decision to assert his right to counsel. Specifically, Detective DeLauder answered Mr. Pugh's question in part by saying..."it's your life." (See Transcript pp. 26, line 21). "It's your life" is a repeated theme throughout Mr. Pugh's interview where the detectives are telling Mr. Pugh to "come clean" and admit what allegedly transpired between Mr. Pugh and the decedent. Moreover, Mr. Pugh does not waive his claim that the government cannot meet its burden in this case because this Court must factor in Mr. Pugh's PCP use on the day of the incident under a totality of the circumstances analysis. The government cannot establish Mr. Pugh was not suffering from PCP intoxication at the time of his interrogation, which makes it less probable Mr. Pugh knowingly, intelligently, and voluntarily waived his rights.

Respectfully submitted,

Jason Downs, #979476
Counsel to Mr. Pugh
Public Defender Service
633 Indiana Avenue N.W.
Washington, D.C. 20004
(202) 824-2427

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Supplemental Memorandum of Points and Authorities to be served, by hand, upon the Office of the United States Attorney, 555 Fourth Street, N.W., Washington, D.C., 20530, Attention: Michael Truscott, Esq., this 24th day of January, 2013.

Jason Downs